NO. 86-703

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL OIL FIELD DIVERS, INC.,
Petitioner,

and

JOHN PARTICK FISHER AND
DENNIS EDWARD JENNINGS,
ON BEHALF OF CERTAIN UNDERWRITERS
AT LLOYD'S, LONDON,
Petitioners,

versus

LONNIE PICKLE,
Respondent,

MARYLAND CASUALTY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

1. Respondent accepts the "Statutory Provision Involved" section of petitioners' application, but adds section (b) of 46 U.S.C.A. § 688 on the basis that it is relevant to the issues discussed herein.

46 U.S.C.A. § 688, (Jones Act)

(a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury,

and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b)(1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of this incident giving rise to the action, if the incident occurred --

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources -- including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions.

As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention of the Continental Shelf.

STATEMENT OF THE CASE

This accident occurred on January 29, 1978. During his employment with the petitioner, IOD, in 1975, 1976, and 1977, respondent, Pickle, spent ninety (90%) percent of his working time aboard two (2) vessels, namely the PIPEFITTER III and the PIPEFITTER VII. He also worked aboard McDermott barges 16, 21, and 22. On all occasions he was assigned to the vessel for the duration of its voyage. The minimum time he worked aboard petitioner's vessels was for three (3) days, and the maximum time was for forty-five (45) days. His work contributed to the mission and function of the vessels.

On the job in question, he was assigned by IOD to the ETPM Barge 701 on January 9, 1978. His accident occurred twenty (20) days later.

At the time of the accident an IOD employee, Jim Connell, was the lead diver or diving supervisor on the job in question. Under IOD's published regulations, Connell set the diving rotation, and had the final authority to determine whether or not it was safe to dive. On January 29, 1978, the IOD crew was working on a "brace setting job" about ten (10) to fifteen (15) feet below the surface of the ocean. It was stipulated by the litigants that the seas were rough at the time of the accident.

Connell testified that the danger in performing the operation in rough seas is that the divers in the water will

be caught in the surge of the seas and washed into the platform causing injury.

Connell decided to have the crew attempt a final dive on the fateful day. He drew up the diving rotation, and ordered Pickle to make the first dive.

While performing his work, the surge (wave action) of the heavy seas washed Pickle into a platform brace causing the injuries which gave rise to this suit.

The trial judge found, as a matter of fact, in his opinion of December 12, 1983 (Petitioner's Writ Application at page A-49).

> "Plaintiff began working as a diver in 1965 and with IOD since it was formed in 1975. From 1975 until the job in question, IOD either secured or was provided for its diving operations, two barges from Cobb Offshore, the Norman Barges, Pipefitter 3 and 7 and McDermott Barges 16, 21, 22. Approximately ninety (90%) percent of the plaintiff's assignment during this period was on the PIPEFITTER III and VII and jobs lasted from three (3) to forty-five (45) days. At the time of the accident, IOD did not own any vessels."

The court found on the question of liability the following facts (Petitioner's Writ Application at page A-50):

> "The final authority vests with the lead diver to determine whether or not it is safe to dive. Jim Connell, the lead diver, prepared the diving

> schedule and although plaintiff did not protest prior to making his fateful dive, Connell did not call it off. As plaintiff said, 'When it came my time, I dove.' His was not to reason why. Once down, plaintiff performed his work in as safe and proper manner as was possible under the circumstances.":

The court concluded, as a matter of law, (Petitioner's Writ Application at page 54):

> "Plaintiff, Lonnie Pickle, was a seaman and member of the crew of the ETPM Barge 701, and would also qualify as a member of the crew of a specific group of vessels consisting of the Norman Barges, Pipefitter 3 & 7, McDermott Barges 16, 21, 22, on which plaintiff spent approximately ninety (90%) percent of his time in 1975, 1976 and 1977."

The court further concluded, as a matter of law, (Petitioner's Writ Application at page 55):

> "The lead diver for IOD, Jim Connell, was negligent in causing the plaintiff to do underwater work in rough seas which caused the plaintiff's injuries and the plaintiff was entirely free of any negligence. Plaintiff's duties was to do his work as he was instructed. He was in no sense obligated to protest against the method of operation which he had been instructed to follow. A Seaman's duty to protect himself is slight."

ARGUMENT

1. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN HOLDING THAT A SEAMAN HAS ONLY A SLIGHT DUTY TO EXERCISE REASONABLE CARE TO PROTECT HIMSELF?

The petitioner simply cannot argue with the factual finding made by the District Judge and affirmed by the Fifth Circuit that the respondent performed his work at the time of the accident in "a safe and proper manner", and the legal conclusion that followed "the plaintiff was entirely free of any negligence", so they attempt to circumvent this factual finding arguing that the Fifth Circuit misstated the tests when they said that "a seaman has only a slight duty to exercise reasonable care to protect himself." Respondent submits that the Fifth Circuit was correct in regards to a seaman's duty to protect himself when following a direct order from his superior. However, even if the Fifth Circuit had said "a seaman has a duty to exercise reasonable care to protect himself" it would make no difference in this case since, as a matter of fact, the respondent performed the work to which he was assigned in a "safe and proper manner."

The petitioner argued on the trial level and on appeal that the plaintiff appreciated the danger of diving in rough seas and because of that state of mind he should have been found to have been at least partially responsible to some degree. In reality, what the petitioner is arguing is that the respondent assumed the risk of working under hazardous conditions.

Assumption of the risk is not available as a defense in Jones Act and admiralty cases. *Sinkler v. Missouri Pac. R. Co.*, 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799 (1958).

In *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 524, 1 L.Ed. 2d 511, 515, 77 S.Ct. 457, 459, the Supreme Court said that the Jones Act employer and shipowner has a duty to provide the seaman with a safe place to work, and a seaworthy vessel, and maintenance and cure for ill seaman, and is responsible for the seaman's damages under the Jones Act, if their negligence played any part even the slightest in producing the injury. In light of the Jones Act employer's obligation what then is the duty of a seaman to protect himself in the face of a direct order by his supervisor to perform his work under unsafe conditions?

The Fifth Circuit Court of Appeals correctly answered this question in the case of *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th. Cir., 1975), at page 523;

> "The duty owed by an employer to a seaman is so broad that it encomplasses the duty to provide a safe place to work. *Vickers v. Toomey*, 5 Cir. 1961, 290 F.2d 426, 429-432. See Gilmore and Black, *The Law of Admiralty*, § 6-37 (1957); Norris, *The Law of Seaman*, Section 692 (3d) ed., 1970). By comparison the seaman's duty to protect himself, (the grounds for any counteravailing legal interest serving to exculpate the employer) is slight. His duty is to do the work assigned, not to find the safest method of work. This is especially true when the supervisor, Hanks in this case, knows the working method used by the seaman, and does nothing about it.

The test set out by the Court in *Spinks* and the cases cited therein, has legal precedence, and conforms with the remedial purposes of admiralty tort law. For, if this is not so, the seaman could not recover his damages based on Jones Act negligence, or the General Maritime Law concept of unseaworthiness, unless he protested or disobeyed the order of the ship's captain or an immediate supervisor.

II. THE COURTS OF APPEALS ARE SHARPLY DIVIDED CONCERNING THE CRITERIA NECESSARY TO ESTABLISH SEAMAN STATUS WITHIN THE MEANING OF THE JONES ACT, 46 U.S.C.A. § 688.

It is well established in this Court, that whether or not a maritime worker is a member of a crew of any vessel is a question of fact. Special-purpose vessel crew members who have no navigational tasks are entitled to Jones Act relief as seaman. *Gianfala v. Texas Company*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed. 2d 737 (1958); *Butler v. Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed. 2d 754 (1958). *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957).

The Fifth Circuit's tests follows the mandate of the Supreme Court. This test for seamen status was established in *Offshore v. Robinson*, 266 F.2d 769 (5th Cir., 1959), and restrictively refined in *Barrett v. Chevron Oil Co.*, 781 F2d 1067 (5th Cir., 1986).

Basically, to qualify as a seaman, the marine casualty victim must be assigned to a "vessel in navigation" (which included special-purpose structures not usually

employed as a means of transport by water, but designed to float on water) *or* he must perform a substantial part of his work on such a vessel *and* the capacity in which he is employed or the duties he performs must contribute to the function of the vessel or to the accomplishment of its mission or to the maintenance during movement or anchorage for future trips. See *Wallace v. Oceaneering*, 727 F2 427 (5th Cir., 1984) and the cases cited therein. In *Wallace*, the Fifth Circuit held that a commercial diver was a seaman,

> (p.436)
> "We hold that a commercial diver who embodies the traditional and inevitably maritime task of navigation, has the legal protections of a seaman when a substantial part of his duties are performed on vessels."

The tests set forth are designed to deny seamen status to those who have only random, sporadic or transitory affiliation with a vessel. *Ardoin v. J. Ray McDermott & Co.*, 641 F2 277 (5th Cir., 1981).

Hence, amphibious workers whose tasks aboard a vessel are merely incidental or casual to their overall work are not seamen.

In this case, Pickle spent ninety (90%) percent of his work time aboard two (2) vessels, namely the PIPEFITTER III and VII. The voyages lasted from three (3) days to forty-five (45) days. One of the functions of the vessels was to serve as a diving base for deep sea divers who performed underwater work. Pickle and the other divers worked, ate and slept on the vessels during their voyages.

A rule that would permit a cook aboard the vessel to have Jones Act protection, but would deny the same protection to divers who face all the seas perils would not be reasonable, nor would it comply with the remedial purposes of admiralty tort law.

It is certainly arguable that divers as well as others assigned to vessels for long periods of time have some duties related to the vessel's transportation, however, no evidence was adduced in that regard because it was not required under existing case law.

In 1982, the Jones Act was amended, 46 U.S.C..Section 688 (b). In that legislation, Congress only denied Jones Acts relief to foreigners working aboard oil-patch vessels in foreign waters. American citizens were not effected. If the United States Congress intended to change the rights of American citizens or resident aliens working aboard vessels, whether considered conventional or special purpose, they could have considered it in 1982, but, as a matter of fact, they were specific in their intent not to effect Jones Act relief to American citizens or resident aliens.

In this case, the fact finder, a United States District Judge, found that the respondent who spent ninety (90%) percent of his work time in the employ of the petitioner was a member of a crew of the vessel upon which he was working at the time of his accident, as well as a designated fleet of vessels provided by his employer, and that finding should not be disturbed. The petitioner does not argue that these barges were not vessels because, as a matter of fact, they have mess facilities, living quarters, lines, bits, and they are navigated upon the ocean just as is any other vessel.

Finally, the petitioner in this case seeks another appraisal of the facts, previously determined by a district judge and the Court of Appeals for the Fifth Circuit. This is not the function of a writ of certiorari. *Rogers v. Missouri Pac. R. Co.*, 1 L.Ed.2d 515, 352 U.S. 559.

CONCLUSION

For the above and foregoing reasons, respondent respectfully submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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